Supreme Court, U.S.
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No. 83-1760

In The

Supreme Court of the United States

October Term, 1983

ST. PAUL FIRE & MARINE INSURANCE COMPANY
CHARLES D. SLATER d/b/a
SLATER BOAT COMPANY
EURO-PIRATES INTERNATIONAL, INC., AND
STEAMSHIP MUTUAL UNDERWRITING
ASSOCIATION, LTD.,

Petitioners,

vs.

RUTH CULVER, ET AL,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision in *James & Laughlin Steel Corp. v. Pfeifer,* 103 S. Ct. 2541 (1983), precludes a Circuit from adopting a single method to compute the loss of future earnings and for adjusting awards to present value in civil and maritime cases.

2. Whether the adoption of the single method for computing loss of future earnings and for adjusting awards to present value in some way reduces Plaintiff's burden of proving his damages.

3. Whether or not a Circuit's adoption of the "below market discount rate" method in some way violates a Defendant's Seventh Amendment right to trial by jury.

STATEMENT OF THE PARTIES

Pursuant to Rule 21.1(b) and Rule 28.1, counsel for Respondents certify that the following named persons are parties to this proceeding:

(1) Mrs. Ruth Culver, individually and as administratrix of the estate of Curtis Culver, and as natural parent of/and Benny Culver, Tonia Culver, Rodney Wayne Culver, and Bridgette Ann Culver;

(2) Charles D. Slater d/b/a Slater Boat Company;

(3) Euro-Pirates International, Inc.;

(4) Ocean Drilling & Exploration Company;

(5) ODECO, Inc.;

(6) Gulf Overseas Marine Corporation;

(7) Gulf Overseas Service Corporation;

(8) Steamship Mutual Underwriting Association, Ltd.; and

(9) St. Paul Fire & Marine Insurance Company.

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(1) *Pfeifer* does not prohibit a Circuit from adopting a single method by which to calculate appropriate awards for lost earnings.

(2) Culver II in no way decreases Plaintiffs' burden of proof.

(3) Culver II does not violate a right to trial by jury.

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RESPONDENTS' BRIEF IN OPPOSITION

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, RUTH CULVER, ET AL, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 722 F.2d 114.

GROUNDS FOR JURISDICTION

Jurisdiction of this Court is predicated upon 28 U.S.C., § 1254(1).

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STATEMENT OF THE CASE

Respondents are the surviving beneficiaries (widow and five children) of Curtis Culver, who received fatal injuries at sea on May 9, 1975. At that time, Culver was the foreman of an anchor-pulling crew working on the Black Bart. Anchors had been placed around the Ocean Queen, a semi-submersible oil and gas drilling rig, and were being pulled so that the Ocean Queen could be moved to another location. During the operation, a cable attached to a buoy snapped or severed causing Mr. Curtis' death. Culver was a general employee of Gulf Overseas.

The jury returned findings that Gulf Overseas, ODECO, the owner of the Ocean Queen, and Slater-Euro-Pirates, owner and operators of the Black Bart, were each negligent or had furnished an unseaworthy vessel, which wrongs illegally caused the death of Curtis Culver.

At the time of death, Culver was thirty-one (31) years old and had a life expectancy of 39.9 years (R. Vol. 8, P. 777), though his work life expectancy was 31 years from the date of the accident, or 27 years from the date of trial (R .Vol. 8, P. 778). At the time of his death, Culver was earning $4.75 per hour and in the five years prior to that, he received an average of nearly $14,000.00 per year in gross income (R. Vol. 6, PP. 388-89). The hourly rate had progressively increased to $6.96 at the time of trial (R.

Vol. 6, PP. 273-275), which projected to $19,048.00 per year with an annual 438 hours of overtime (Vol. 8, P. 766). The entire family was in good health.

Ostensibly relying on the Fifth Circuit case of *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), the district court allowed testimony concerning discount rates and the earning power of money invested in low-risk bonds. The jury was instructed to "discount the total amount" of any award by a percentage that represented an appropriate rate of interest. The district court did not allow testimony, charges, or interrogatories to be submitted of the effects of inflation on probable loss of future income. In other words, Culver was not permitted to show any likely increase in future earnings due to inflation but the award was nevertheless discounted by an interest factor reflecting anticipated inflation.

The original panel decision of the Fifth Circuit Court of Appeals affirmed. *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir. 1981).

Respondents' Motion for Rehearing *En Banc* was granted so that the Fifth Circuit could reconsider *Johnson v. Penrod Drilling Co., supra.* In its subsequent opinion, *Culver I*, 688 F.2d 280 (5th Cir. 1982), the Fifth Circuit overruled *Johnson v. Penrod Drilling Co.* but declined to select a single approach by which district courts may accept evidence relative to the impact of inflation. The Court held that appropriate economic evidence could be presented by either party to ascertain damages for loss of future wages on a case by case basis.

Petitioners filed a Petition for Rehearing of the *en banc opinion.* While under consideration of the Fifth

Circuit, this Court decided *Jones & Laughlin Steel Corp. v. Pfeifer,* 103 Sup. Ct. 2541 (1983), on June 15, 1983. Thereafter, on December 23, 1983, the Fifth Circuit *en banc* withdrew portions of its *Culver I* and rendered a new opinion, *Culver II,* 722 F.2d 114 (5th Cir. 1983). *Culver II* held that the sole method to adjust damage awards to account for inflation is a "below market discount rate method."

Petitioners' Petition for Rehearing of *Culver II* was overruled. The *Culver II* decision is now being challenged in this Court. Respondents have yet to be in any way compensated for the death of their father and husband, more than nine years after his death, and after more than three years their appeal was pending in the Fifth Circuit.

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REASONS TO DENY THE WRIT

ARGUMENT

Culver II is in actuality a consolidated case with *Byrd v. Reederei,* No. 78-3064. The *en banc* opinion in the consolidated case is what has been referred to as *Culver II,* 722 F.2d 114 (5th Cir. 1983), the final opinion of the Fifth Circuit in this case.

Petitioners and Defendants in the consolidated case of *Byrd* have also sought a review by this Court by way of Writ of Certiorari. The undersigned are in total agreement with the response filed by Respondent Byrd and also believe that the Petition deserves but a brief response.

At the heart of Petitioners' argument is the premise that this Court's opinion in *Pfeifer* mandates that all three available methods for calculating award of future pecuni-

ary damages in an inflationary economy be available to all parties. Respondents do not pretend that they know better than this Court what this Court meant by its decision in *Pfeifer*. What can be said nevertheless is that this Court reviewed three available methods, discussing the benefits to be gained by each, and the problems that can arise with the use of any of the methods. The Court then was of the opinion that it would render a very limited decision only necessary to resolve the case before it. The precise holding was that the "total offset" method is not mandatory in federal courts because of its inherent difficulties. This was based upon the Court's conclusion that the total offset method was the least desirable in the Court's opinion.

The long-term result that the Court invisioned was legislative intervention, that branch being more able to study the situation. Meanwhile, the Circuit Courts must grope with the problem for there is no guarantee that the legislative branch will ever consider the matter. For this reason, the Fifth Circuit cannot be criticized for mandating the use of the below market discount rate method which this Court in *Pfeifer* implicitly authorized more than any other of the two methods. In *Pfeifer,* this Court stated that a trial court utilizing the below market discount rate method, "should [not] be reversed if it . . . a rate between one and three percent and explains its choice." This is exactly what the Fifth Circuit has done and should accordingly not be reversed. If a trial court cannot be reversed for mandating use of the below market discount rate method in any given trial, as this Court squarely held in *Pfeifer,* the Court of Appeals cannot be reversed for mandating use of that method in the trial court which it supervises.

Further, a Plaintiff's burden of proof is in no way decreased unconstitutionally nor is a Defendant's right of trial by jury in any way infringed upon by a court's use of any particular method for measuring pecuniary loss in cases such as these which are based upon sound economic principles and which have been approved by this Honorable Court. For the reasons that the lower court's decision is perfectly inconsistent with *Pfeifer* and because no conflicts have developed among the lower courts concerning the implications of *Pfeifer,* we respectfully submit that certiorari should be denied.

Respectfully submitted,

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